IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-111

Gloria M. Lohman,

Respondent,

v.

General American Life Insurance Company,

Petitioner,

and

Federal Deposit Insurance Corporation and Federal Deposit Insurance Company as Statutory Receiver of Cedar Vale National Bank,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered April 20, 1973, with petition

to rehear denied May 17, 1973, in Case No. 72-1123, GLORIA M. LOHMAN, plaintiff-appellee v. GENERAL AMERICAN LIFE INSURANCE COMPANY, defendant-appellant, and FEDERAL DEPOSIT INSURANCE CORPORATION and Federal Deposit Insurance Corporation as Statutory Receiver of Cedar Vale National Bank, appellees, wherein the Eighth Circuit Court of Appeals affirmed the judgment of the United States District Court for the District of South Dakota against the petitioner and in favor of Gloria M. Lohman, et al.

A certified record in said case, including proceedings in both the District Court and the Court of Appeals, is furnished herewith, in accordance with this Court's rules.

OPINIONS BELOW

The opinion of the Court of Appeals filed April 20, 1973, and the order denying the petition to rehear, appear as Appendices A and B hereto respectively, and are not yet published.

JURISDICTION

The judgment of the Court of Appeals affirming the District Court was entered April 20, 1973, and the Court denied the petition to rehear on May 17, 1973. This Court's jurisdiction is invoked under 28 USC, Section 1254(1).

QUESTIONS FOR REVIEW

1. Did the Court below err in holding that the District Court (1) had jurisdiction to set aside its former order of dismissal and (2) did not abuse its discretion in setting aside the order of dismissal as "void", after the appeal

from the dismissal had been dismissed, and acting on its own motion, and without any finding as to why the former order of dismissal was "void"?

2. Did the Court below err in refusing to reverse the case because the Trial Court failed to charge the law as enunciated by the Supreme Court of South Dakota, despite the fact that this omission was repeatedly called to the Trial Court's attention?

3. Was the petitioner denied due process of law when (1) a judgment in its favor was set aside as "void" when neither party contended it was void and the Court itself did not state in what respect it was void; and (2) in a diversity case, the applicable state law was not charged, as required by *Erie v. Tompkins*, 304 U.S. 64?

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the Constitution of the United States reads in part:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

Rule 60(b)(4), Federal Rules of Civil Procedure reads:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons ... (4) the judgment is void; ... The motion shall be made within a reasonable time, ..."

STATEMENT OF THE CASE

This suit was filed in the State Court of South Dakota, and was removed to the United States District Court because diversity of citizenship existed between the parties.

The complaint asked for a judgment under the double indemnity clause of a life insurance policy. The defendant General American tendered into court the face amount of the policy, but denied that the death of the insured was accidental. After interminable difficulties in trying to get the plaintiff to respond to orders of the Court, and on April 19, 1971, an order was entered dismissing the plaintiff's complaint against General American. On May 5, a Notice of Appeal was filed by plaintiff, and on May 7 the record was mailed to the Clerk of the Court of Appeals. On June 15, the plaintiff's appeal was dismissed, and on August 3, 1971, plaintiff filed a Motion to Amend the order of dismissal dated April 19, 1971. The District Court, ignoring that Motion, set aside as "void" the Order of Dismissal without specifying the reason it was void.

At the trial of the case before a jury, defendant General American repeatedly requested the Court to charge the law of South Dakota, as set out in *Headlee v. New York Life Ins. Co.*, 12 N.W. 2d 313 (S.D. 1943). The Court refused to do so, charging instead that the jury had only a two-way choice: "(a) your verdict will be for the plaintiff, Gloria M. Lohman, if, under this record you find William D. Lohman's death to have been caused by an accident, and (b) otherwise for the defendant insurance company if you find his death not to have been caused by an accident, or under this record, a suicide."

Under *Headlee* (*supra*), a third alternative existed and should have been charged:

> "Likewise as to the opposing evidence, the jury should be instructed to weigh its credibility and effect in the usual way, and finally, upon the whole evidence, to determine whether death by accident has occurred, *bearing in mind that if the evidence leaves their minds*

in such doubt that they are unable to decide the point, the verdict should be against the party upon whom the burden of persuasion rests." (emphasis supplied)

ARGUMENT

This case involves a policy of life insurance in the amount of $100,000.00 which contained a double indemnity clause providing another $100,000.00 if the insured died solely as a result of accidental means.

The insured, a cattle rancher and land speculator, died as a result of a self-inflicted gunshot wound to the head. There were no witnesses to his death, which occurred on a lonely butte in one of his pastures.

At the time of his death, the insured owed approximately a million and a half dollars and had assets of only about $200,000.00. Many of his debts were based upon fraudulent notes bearing bogus signatures, some of which the insured himself had signed and some of which his widow admits to having signed.

The insurance company paid the $100,000.00 of life insurance, but refused to pay the accidental death benefit.

Issue was joined on the question of whether or not the death was accidental.

In preparing for trial, the defendant insurance company submitted interrogatories to the widow which she refused to answer. Again and again the Trial Court ordered her to respond to the questions, but she continued to refuse.

Finally, on April 19, 1971, the Court put down an order which said:

"The Court Finds:

That the Order to compel Plaintiff to Answer Interrogatories not later than January 15, 1971, filed December 17, 1970, has not been complied with, Plaintiff having wholly and totally failed to answer the various Interrogatories in compliance with statute and the Orders of this Court, and the time for answering, including substantial extensions of time, has expired.

The Court Concludes:

That the Court has been more than patient with Plaintiff in the matter of granting additional time to answer said Interrogatories; that Plaintiff [sic] is entitled to an Order dismissing the Complaint and action of the Plaintiff against the Defendant General American Life Insurance Company, all in accordance with the Order of December 17, 1970, but that action be reserved with respect to other pleadings in the action involving Defendant and Cross-Claimant, as well as Additional Defendants.

Now, therefore, on motion of Douglas W. Bantz, IT IS HEREBY ORDERED that Plaintiff's cause of action and Complaint against the Defendant General American Life Insurance Company be, and the same is, hereby dismissed in all respects pursuant to Rules 37 and 41 (b), Federal Rules of Civil Procedure.

Dated April 16, 1971."

Following the entry of this order, the plaintiff's lawyer filed an appeal to the Circuit Court of Appeals for the Eighth Circuit. However, because of failure to properly prosecute this appeal, it was dismissed on June 15, 1971.

Later, and on August 3, 1971, plaintiff's counsel filed a motion with the Trial Court to amend the order of dismissal.

Instead of acting on that motion as filed, the Trial Judge, *sua sponte*, set aside the previous order of dismissal as having been "void". The Judge did not specify any ground for the order having been void. (See Appendix in Court of Appeals p. 145).

We insist that his action in so doing was clearly erroneous.

As one studies his order of dismissal of April 19, 1971, it is quite clear that the order was valid on its face.

That being so, there had to be some other reason for its being declared void—and we insist that (a) there was no such other reason, or (b) even if there were such, the Court failed to state it, and was required to do so. To hold otherwise is tantamount to telling a defendant in a criminal trial that he is "guilty"—and when he asks what he is "guilty" of, merely telling him that he is "guilty" of being "guilty".

It is a "boot-strap" operation, and not only constitutes an abuse of discretion, but is a denial of due process under the Fifth Amendment to the Constitution of the United States.

* * *

Also, the rule established by *Erie Railroad v. Tompkins* was totally ignored by the Trial Judge in his charge to the Jury.

Despite repeated efforts of defense counsel, the Court refused to charge the law of South Dakota as it pertains to the burden of proof in suits for accidental death benefits under such insurance policies as this.

Under the charge as given, the Jury was told:

"(a) your verdict will be for the plaintiff, Gloria M. Lohman, if, under this record you find William D. Lohman's death to have been caused by an accident, and (b) otherwise for the defendant insurance company if you find his death not to have been caused by an accident, or under this record, a suicide."

This limited the jury to one of two conclusions, and was grossly prejudicial.

For, as the Supreme Court of South Dakota said in the case of *Headlee v. New York Life*, involving this identical question:

"... We believe this second part of the instruction was error occasioned by a failure to distinguish this action, which is based upon the double indemnity clause of the life insurance policy, from the action in which the insurer in a life policy raises the defense of self-destruction to the regular life indemnity.... In the present action it is only accidental death that is insured against. The burden is upon the plaintiff 'to show that the specific condition precedent on which the liability is contingent has taken place.', i.e., accidental death. [citing authorities] Since death by self-destruction is not an accidental but an intentional means the evidence must by its purport negative such means. We appreciate that there are cases apparently holding a view contrary to that above expressed. We believe, however, that such contrary view fails to recognize that only death by accident is insured against, and that death by self-destruction or suicide is not an exception to the contractual liability but simply fails to come within the liability created by the contract."

Also, it went on:

"Likewise as to the opposing evidence, the jury should be instructed to weigh its credibility and effect in the usual way, and finally, upon the whole evidence, to determine whether death by accident has occurred, bearing in mind that if the evidence leaves their minds in such doubt that they are unable to decide the point, the verdict should be against the party upon whom the burden of persuasion rests."

Only by the Court giving the above could the jury be properly charged.

It was clearly the duty of the Trial Judge to charge the law as set out above in the *Headlee* opinion, and his steadfast refusal to do so obviously deprived the defendant of a fair trial and constituted a denial of due process under *Erie v. Tompkins*.

Before closing, we would like to point out the following:

Judge Durfee of the United States Court of Claims who wrote the opinion for the Court of Appeals stated that as to the "void" order, the District Court had "apparently considered its prior order of dismissal void because, under the circumstances of the case, the dismissal was tantamount to a denial of due process of law." We respectfully suggest that this unsupported speculation is no way to remedy the error on the part of the district Judge in not specifying why the order was void.

And, as to another error assigned in the Court of Appeals relating to the admission in evidence of a certified copy of a death certificate which stated on its face that the insured's death was accidental, Judge Durfee had the following comment:

"We agree that the opinion of accidental death should have been excised from the certificate prior to its ad-

mission into evidence, but under the facts and circumstances of this case, we think the admission did not constitute reversible error."

Anyone at all familiar with the difficulties that insurance companies face in cases of this sort must instantly recognize that to leave this admitted illegality unreversed is a terrible injustice to this appellant.

Certiorari should be granted to the end that justice may be done.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 72-1123

Gloria M. Lohman,

Appellee,

v.

General American Life Insurance Company,

Appellant,

and

Federal Deposit Insurance Corporation and Federal Deposit Insurance Company as Statutory Receiver of Cedar Vale National Bank,

Appellees.

On Appeal from the United States District Court for the District of South Dakota, Northern Division.

Submitted: November 13, 1972.
Filed: April 20, 1973.

Before Gibson, Circuit Judge, Lay, Circuit Judge, and Durfee, Senior Judge of the United States Court of Claims.*

Durfee, Senior Judge.

This is an appeal from a judgment of the United States District Court for the District of South Dakota, Northern

* Senior Judge James R. Durfee of the United States Court of Claims is sitting by designation.

Division, in favor of plaintiff-appellee, Gloria M. Lohman, and the additional defendant-appellees, Federal Deposit Insurance Corporation and Federal Deposit Insurance Company as Statutory Receiver of Cedar Vale National Bank, and against defendant-appellant, General American Life Insurance Company.

The action was brought by Gloria Lohman as plaintiff on a double indemnity policy of insurance issued by defendant-appellant on the life of her deceased husband, William D. Lohman.

The FDIC had notified defendant it claimed the principal sum. When the case was removed from a state court to a Federal court, the FDIC was made a party by interpleader and the sum of $100,000.00 plus accrued interest was paid into court.

The FDIC counterclaimed against plaintiff to collect approximately $1.5 million in bogus notes at Cedar Vale National Bank in Kansas, alleging plaintiff and her husband were parties to the fraud, and that the entire estate was liable therefor. The FDIC also cross-claimed against defendant praying that the court impress a "constructive equitable trust" in its favor, and grant judgment for all funds owing under the insurance policy issued by defendant.

At the trial, the only issue for the jury was whether Lohman's death was accidental. The jury found that the death was accidental, and judgment was entered against defendant-appellant on the verdict. We affirm.

Before discussing the facts and merits of the case, we shall deal with a procedural question raised by appellant as the first issue of its appeal.

[3]

After a dismissal of plaintiff's case by order of April 16, 1971, of the District Court, plaintiff filed notice of appeal with this court, which dismissed the appeal by order of June 15, 1971, on motion by defendant, plaintiff having failed to perfect her appeal pursuant to Rule 30(b), Federal Rules of Appellate Procedure and local Rules 8 and 13. Thereafter, plaintiff filed a motion in the District Court to amend the order of the District Court dismissing her complaint so that she could reinstate her case. On October 15, 1971, the trial court made findings of fact as to the rights of plaintiff to maintain her action, and concluded that its prior order of dismissal was void under Rule 60(b)(4) Federal Rules of Civil Procedure, and that: "Gloria M. Lohman's original status as plaintiff in this action, be, and it is hereby shown and established as having had continuous existence since the time this action was commenced."

Appellant submits (1) that the District Court was without jurisdiction to act under Rule 60(b) upon plaintiff's motion to amend that court's order dismissing the complaint; (2) that the District Court did not have the power to "deviate" from this court's prior mandate of dismissal of the appeal when permission to proceed was not obtained from the Eighth Circuit Court of Appeals; and (3) that the District Court erred in holding that its previous order of dismissal under Rules 37 and 41(b) was void under Rule 60(b)(4), Federal Rules of Civil Procedure. We deal with these arguments in the order presented.

For its proposition that the District Court was without jurisdiction to act under Rule 60(b), appellant relies chiefly upon *Thornton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940) where Judge Sanborn said, as to a decision by this court on appeal with remand to the District Court:

[4]

A mandate is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue which was not expressly or impliedly disposed of on appeal. (Footnote omitted). Since, however, a final judgment *upon the merits* concludes the parties as to all issues which were or could have been decided (*Guettel v. United States*, 8th Cir., 95 F.2d 229, 230, 118 A.L.R. 1060 and cases cited), it is obvious that such a judgment of this court on appeal puts all such issues out of the reach of the trial court on the remand of the case. *** [Emphasis supplied].

Appellant argues that the former decision of this court dismissing plaintiff's appeal was a final judgment on the merits, and therefore the District Court was without jurisdiction further to consider any issues.

First of all, it is clear that the District Court's initial decision was not a judgment on the merits. Even if this appellate court had fully considered the initial decision of the trial court, we in turn would not have been rendering a final judgment on the merits.

Rule 41(b) Provides:

> *Unless the Court in its order for dismissal other wise specifies*, a dismissal under this subdivision and any dismissal not provided for in this Rule * * * operates as an adjudication upon the merits. [Emphasis supplied].

The District Court in its order for dismissal did "otherwise specify" by finding that plaintiff had failed to comply with the court's order to compel plaintiff to answer interrogatories, as ordered pursuant to Rules 37 and 41(b) of the Federal Rules of Civil Procedure.

A similar situation was presented in *Madden v. Perry*, 264 F.2d 169, 175 (7th Cir. 1959) where the court said:

[5]

We hold that, under Rule 41(b), Judge Perry, having in the Order for Dismissal specified the grounds therefor, which, as to the locals (Unions) did not involve the merits of the case, the dismissal order does not operate as an adjudication upon the merits.

When the appeal from the dismissal first came to this court, we did not even go so far as to consider the grounds for the dismissal. This court ordered dismissal of the appeal on the technical ground urged in motion by General American.[1] Dismissal on this technical ground can hardly be considered a "final judgment on the merits" as required by *Thornton*, *supra*. The mandate of this court dismissing plaintiff's appeal neither "encompassed" nor "disposed of" any of the issues subsequently considered by the District Court.

Appellant's reliance on *Butcher & Sherrerd v. Welsh*, 206 F 2d 259 (3rd Cir. 1953), *cert. denied*, *Alker v. Butcher & Sherrerd*, 346 U.S. 925, *reh. denied*, 347 U.S. 924, *reh. denied*, 347 U.S. 940, *reh. denied*, 348 U.S. 939, vacated on other grounds 223 F.2d 262, is misplaced. In that case there was an initial decision on the merits by the trial court and the trial court's judgment was affirmed on the merits, 151 F.2d 907 (1945). The case of *Tribble v. Bruin*, 279 F.2d 424 (4th Cir. 1960) is similarly not on point. In that case the trial court granted defendant's motion for judgment n.o.v. after a trial and jury verdict. The Court of Appeals, considering the merits of the case, reversed and remanded with directions to enter judgment pursuant to the reinstated jury verdict.

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[1] General American's motion for dismissal of the appeal was based upon the technical ground that plaintiff had not " 'served on the Appellee (General American) a designation of the parts of the record which he intends to present for review' as required by Rule 30(b), Federal Rules of Appellate Procedure."

[6]

Our case falls within the class of cases described in 7 *Moore's Federal Practice* (1972 ed.), 60.30 [2], at page 424:

> And first, we shall consider the case where the appeal is dismissed, without a decision on the issues. * * * Since there is no problem of deviating from the appellate court's mandate and since the appeal no longer pends, the district court has the power to entertain a timely motion for relief under 60(b).

Appellant's second contention that the District Court did not have the power to alter or deviate from this court's prior mandate of dismissal of the appeal when permission to proceed was not obtained from this court, is equally without merit. To repeat the language in *Thornton*, *supra*, at 320:

> * * * A mandate is completely controlling as to all matters within its compass, but on remand the trial court *is free to pass upon* any issue which was not expressly or impliedly disposed of on appeal. (Footnote omitted). [Emphasis added].

Further elaboration is provided in *7 Moore's Federal Practice* (1972 ed.), 60.30 [2] at 425, 426:

> * * * The authorities seem uniform that a mandate from a reviewing court is controlling as to all matters within the compass of such mandate and as to such matters the district court, after remand, can take no further action. At times a motion for relief will not raise matters that are within the compass of the mandate, and in that event the district court clearly has the power to proceed with the 60(b) motion without leave of the appellate court.

We additionally find no fault in the procedure whereby plaintiff sought to vacate dismissal of her complaint. *See Stebbins v. State Farm Mutual Automobile Insurance Co.*,

413 F.2d 1100 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 895 (1969). *See also Mooney v. Central Motor Lines*, 222 F.2d 569 (6th Cir. 1955); *Hubbard v. Baltimore & Ohio R.R. Co.*, 249 F.2d 885 (6th Cir. 1957).

Last, appellant argues that the District Court erred in holding that its order of dismissal dated April 16, 1971, was void, vacating its prior order under Rule 60(b)(4), F.R.C.P. We agree with appellant that a District Court has power to dismiss a plaintiff's suit for repeated failure to comply with court orders requiring discovery. This, however, does not settle the issue. Although it undisputedly had jurisdiction of person and subject matter, the District Court apparently considered its prior order of dismissal void because, under the circumstances of the case, the dismissal was tantamount to a denial of due process of law.[2]

It is not our task in this case to consider anew whether or not the former order of dismissal was tantamount to a violation of due process but rather to ascertain whether or not the District Court abused its discretion in judging its former order void. The District Court clearly had power to grant relief under Rule 60(b). The grant of relief involved an appraisal of the facts. Such an appraisal

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[2] In its order vacating the prior order of dismissal, the District Court concluded: "(1) that Gloria M. Lohman at the time of her husband's death acquired a vested interest in the $100,000 then due under said policy and a right upon proof of accidental death to the prescribed double indemnity; (2) that the insurance company's deposit in registry of said $100,000 and accrued interest operated as an admission of liability in accordance with the terms of its insurance contract, with liability for double indemnity included should the proof be sufficient to show death to have been caused by accident; (3) that the order of April 16, 1971, insofar as it appears to have affected those insurance rights and interests of the beneficiary, was void, Rule 60(b)(4), Fed. R. Civ. P., that the reservations therein contained explicit or necessarily implied, continued the right of Gloria M. Lohman to defend against the cross claimants and additional defendants, thereby actually in that part of the case and in any other aspects involving the merits preserving her status as the plaintiff and (4) that the movant under her motion is entitled to the relief she seeks."

and grant of relief are largely within the discretion of the trial court. *See Assman v. Fleming*, 159 F.2d 332 (8th Cir. 1947); *Conerly v. Flower*, 410 F.2d 941 (8th Cir. 1969). There has been no clear showing of abuse of discretion. *Farmers Co-op. Elevator Ass'n Non-Stock v. Strand*, 382 F.2d 224 (8th Cir. 1967), *cert. denied*, 389 U.S. 1014 (1967). We therefore have no reason to find the District Court in error in vacating its former order of dismissal of the complaint.

Accordingly, we conclude that the District Court's order of October 15, 1971, vacating and setting aside the former order of dismissal of plaintiff's complaint, was a valid and proper exercise of the trial court's jurisdiction and authority.

At the trial, the basic issue of fact was whether Lohman's death was accidental.[3] Defendant never expressly interposed suicide as an affirmative defense to its liability for double indemnity under the policy, but defended on the theory that plaintiff could not carry the burden of proving that Lohman's death was accidental under the terms of the policy.

There was an extensive trial and many conflicts between the testimony of many witnesses as to the life and death of William D. Lohman. Most of these conflicts were obviously determined in favor of plaintiff-appellee by the jury in finding that his death was accidental. In our discussion of the other issues presented, we will deal with the facts in more detail, but in essence, they are as follows: William D. Lohman died on July 10, 1967, and it is stipulated

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[3] General American paid the sum of $100,000 on the ordinary life portion of its policy and the amount in dispute was whether an additional $100,000 was due. That amount was due only if the death of William Lohman was accidental within the terms of the policy.

[9]

that he died of a gunshot wound, that there were no eye witnesses to his death, and that the insurance policy which is the subject of this suit was in effect on the date of death, with premiums paid up to that time. He had been a rancher all his life. He was in good health. He was happily married and had two children, both of whom had finished high school and were working. His living habits were simple and inexpensive, and he did not gamble. He was engaged in extensive ranching operations, and owned thousands of acres in North Dakota and Canada in a partnership called the L & O Cattle Company. In July 1967 Lohman and his partner became heavily indebted to the Cedar Vale National Bank of Kansas for large amounts of money obtained through notes, some of which bore false or bogus signatures. During the week before his death, he was trying unsuccessfully to borrow over half a million dollars to repay partnership indebtedness, and mentioned going to jail or being indicted in this connection. At the time of Lohman's death his estate was insolvent. There was some testimony that he appeared depressed that week, but most of the witnesses testified that there was no change in his attitude or disposition, and that he was making extensive plans for the future up to the time of his death.

On July 10th, after returning from a business trip to Montana, the Lohman couple drove to the home of their ranch's caretaker to get a pickup truck. William Lohman took the truck and a Winchester 308 rifle. He said that he intended to look at some livestock, and maybe shoot an antelope, and then meet his wife in a couple of hours in nearby Mobridge, South Dakota. The truck was found the next morning on a hill overlooking a watercourse on the ranch where antelope were sometimes found. The door of the truck was open on the driver's side, and the motor run-

ning. The body of William D. Lohman was lying on the ground a few feet from the open door with the gun nearby with one shell discharged and another in the clip. The gunshot wound was in the middle of the forehead, with the path of the bullet going directly into and through the middle of Lohman's cranium.

Appellant submits that the evidence was not sufficient to go to the jury on the issue of the cause of Lohman's death; that plaintiff-appellee's case is inconsistent with any plausible or reasonable theory of accident whatsoever; that a verdict of accidental death could only be based upon speculation and conjectures; and that the trial court erred in failing to direct a verdict and the jury's verdict cannot be sustained on appeal.

Two highly qualified and experienced experts, Dr. Wecht and Mr. McDonnell, testified that there was nothing about the fatal wound to indicate that it was a contact wound, indicating suicide. These two witnesses and others testified that the weapon could have been discharged while Lohman was slipping, falling or stumbling on a smooth moss-covered rock directly below the open door where he could have stepped in leaving the truck, or while he was pulling the rifle from the truck to shoot an antelope. From these conclusions and their consideration of all the other relevant facts, both of these expert witnesses expressed the opinion that death by accident was more likely than death by suicide. There was considerable opposing expert testimony that this was a contact wound and self-inflicted, but the weight of this testimony was for the jury to determine. The jury obviously accepted the testimony of plaintiff's witnesses as showing a reasonable theory, consistent with the facts, that Lohman's death occurred by accident. The trial court was not in error in failing to direct a verdict for de-

fendant-appellant since there was sufficient evidence to go to the jury, and the evidence was sufficient to sustain the jury's verdict that Lohman's death was accidental.

Plaintiff was not required to prove the exact causation of the accident, but only that the death was caused by "external, violent and accidental means" as required for double indemnity by the insurance policy. *Iverson v. Mutual Life Insurance Co. of New York*, 87 F.2d 441 (8th Cir. 1937).

In instruction (16), the court charged the jury to find for plaintiff "if under this record you find William D. Lohman's death to have been caused by an accident, and otherwise for defendant insurance company if you find his death not to have been caused by accident, or under this record, a suicide." Defendant excepted to instruction (16) and requested that the court amplify and correct its instruction in accordance with the leading South Dakota case of *Headlee v. New York Life Insurance Co.*, 12 N.W.2d 313 (S.D. 1943). Specifically, defendant requested that the court add to the above quoted instruction these words: "bearing in mind that if the evidence leaves their minds in such doubt that they are unable to decide the point, the verdict should be against the party upon whom persuasion rests."

There is a clear distinction between the jury instructions held to be erroneous in *Headlee*, *supra*, and the instruction given in the present case. In *Headlee*, the South Dakota Supreme Court stated, at 315:

> The trial court instructed the jury, first, that the burden of proof was upon the plaintiff to prove that Robert's death resulted solely from accidental means, and second, *that the burden of proof was upon the defendant to prove that the death was by self-destruction*. We believe this second part of the instruction

[12]

was error occasioned by a failure to distinguish this action, which is based upon the double indemnity clause of the life insurance policy, from the action in which the insurer in a life policy raises the defense of self-destruction to the regular life indemnity. [Emphasis supplied.]

In the court's instruction (16) excepted to in the present case, the trial court was not discussing burden of proof, and nowhere did it say the "burden of proof was upon the defendant to prove that the death was by self-destruction," as in *Headlee, supra*. On the contrary, the trial court did give the proper instructions that the burden of proof was upon plaintiff to prove that the death was accidental. Although defendant in theory did not expressly plead suicide as a defense, it clearly raised the issue of suicide by the presentation of its evidence and cross-examination throughout the trial. If the jury had found the evidence equally balanced between accidental death and suicide, it would have been governed by the court's repeated instruction that "the burden is on Gloria (plaintiff) by a preponderance of the evidence, to show the death to have been caused by accident."

Defendant cites *New York Life Insurance Co. v. Anderson*, 66 F.2d 705 (8th Cir. 1933) where an instruction that the jury should find for plaintiff if the evidence is equally balanced was specifically disapproved. No such instruction was given here.

The court very properly ruled that adding the requested language to the instructions would be "too much detail, and give too much emphasis on the point. And it's actually within the court's instruction relating to burden of proof and, for that reason, is overruled."

Appellant asserts that the District Court erred in overruling its Motion for a Mistrial. The motion was based

[13]

upon the supposed cumulative effect (a) of testimony given by plaintiff which appellant claims was hearsay and prejudicial, and (b) of certain statements by counsel for the FDIC before the jury. To dispose of this claimed error, it is useful at this point to explain more fully the FDIC's interest in this suit.

Before the instant suit was started, the FDIC had filed a creditor's claim against the estate of William Lohman for $1,460,538.66. The claim in part arose out of a "Guarantee Agreement" signed by Lohman to repay indebtedness due the Cedar Vale National Bank. The probate court issued an order on the claim allowing $580,954.61 with interest. The balance of the claim was left open by the probate court for further proof.

Defendant General American, by its crossbill for interpleader, first brought the FDIC into this action as additional defendants. Thereafter, the FDIC in its own right crossclaimed against General American Life Insurance Company both as to the monies paid into court and for the monies due by reason of the double indemnity provision of the policy claiming that a large portion of the insurance premium paid on the General American policy had been paid out of funds wrongfully obtained by William Lohman from the Cedar Vale National Bank for which FDIC was thereafter acting as receiver. The FDIC also counterclaimed against plaintiff Gloria Lohman, asserting three counterclaims among which it alleged its claim filed against the estate of William D. Lohman in the total amount of $1,460,538.66 plus interest.

The matter of the "Guarantee Agreement" was first opened up in cross-examination of plaintiff by defendant General American's counsel as to the FDIC claim in the probate court and plaintiff's contesting the claim. On re-

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direct examination the court allowed Gloria Lohman to testify, over defendant's hearsay objection, about her husband's understanding that the "Guarantee Agreement" was not binding upon him if the bank closed.

Counsel for FDIC then cross-examined plaintiff on the same subject matter. No objections were raised by General American at the time of this complained of testimony, and no motion was made for a mistrial until later, after the FDIC had withdrawn part of its claim against the estate. Appellant claims that Gloria Lohman knew nothing about the agreement until after Mr. Lohman's death and never talked with him about it.

Evidence as to whether the Guarantee Agreement signed by Lohman and his partner was to become ineffective if the bank closed, was given not only by plaintiff's testimony, but by two other witnesses present when the guaranty was given. They also testified that they understood at the time this transaction was made that the guaranty was to be ineffective as to Lohman if the bank closed, and it did close shortly thereafter. Plaintiff's testimony as to her husband's knowledge of the agreement was therefore only cumulative and not prejudicial.

Defendant General American asserts further prejudice by the fact that after plaintiff's testimony, counsel for FDIC stated to the jury that "by reason of our investigations" he was authorized to withdraw the contingent claim in the sum of the balance due by virtue of the Guarantee Agreement in the probate court. This statement, defendant claims, "was deliberately designed to show Lohman's innocence and thus, lack of motive for suicide. It introduced a collateral matter which had no proper place in the case." If it was a collateral matter, General American first brought it into the case by its own cross-examination of

plaintiff in its obvious effort to prove that Lohman's financial troubles contributed to his alleged suicide.

It was only after General American had been permitted to go into the FDIC's claims and amounts thereof, including the amounts of unallowed and unproven claims filed in the probate court, that counsel for FDIC stated for the record that its contingent or unallowed claims against the estate would be dismissed. The FDIC, having asserted the claim in one of its counterclaims against plaintiff Mrs. Lohman, could most certainly withdraw and dismiss it.

After FDIC announced to the jury that the contingent claim would be dismissed and the dismissal filed with the probate court in Walworth County, it was made perfectly clear that the allowed portion of the claim in the neighborhood of $580,000.00 plus interest was left against the estate and the trial court thereafter instructed the jury to "disregard completely the comments made by counsel for the FDIC as to the contingent claim having been withdrawn." The trial court further commented to the jury that, "Those are matters which are for the court to decide later and have no particular bearing, I don't think, on either aspect of the case of either accidental death or the defense. I think I will leave it that way and I think that will correct any possibility of misunderstanding on the part of the jury." These instructions and comments to the jury certainly corrected any possible error claimed by appellant.

In *Chicago & N.W. Ry. Co. v. Kelly*, 74 F.2d 31 (8th Cir. 1934) plaintiff there was suing for personal injuries. He testified and his counsel alluded to his family responsibilities. Numerous objections were sustained to this testimony, and numerous exceptions noted to those allusions and arguments by counsel for plaintiff. Although this court reversed the trial court's judgment for plaintiff be-

cause of these repeated and deliberate acts of misconduct by plaintiff's counsel, it said at 35:

> The court made no mention of the subject-matter of these objections in the charge to the jury.
>
> The admission of testimony showing family responsibilities usually has been held error. (Citations omitted). ***Whether the admission of such testimony is reversible error largely depends on whether it has created passion and prejudice in the minds of the jury.*** Courts should exercise great caution in setting aside judgments because of inadvertent remarks made by litigants or counsel during a hotly contested trial, even though improper, unless it clearly appears that they aroused the sympathy or prejudice of the jury and influenced the verdict. [Emphasis supplied].

Even if we were to accept General American's contention that the testimony of Gloria Lohman and the statements by FDIC hereinabove discussed were inadmissible, it does not clearly appear "that they aroused the sympathy or prejudice of the jury and influenced the verdict," in the words of *Chicago & N.W.Ry. Co., supra.* This is even more evident in view of the court's comments and admonitions to the jury that these matters had no particular bearing on accidental death and "to disregard completely the comments by counsel for the FDIC as to the contingent claim having been withdrawn." The trial court was acting well within the limits of sound discretion in denying defendant General American's belated motions for mistrial.

Defendant also moved the trial court to dismiss the FDIC or limit its participation in the trial after FDIC entered into a pre-trial, court-approved settlement agreement with plaintiff, the terms of which made it a co-plaintiff with Gloria Lohman. This motion was denied. Defendant asserts error.

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Defendant's position is that FDIC had no independent claim against it after the settlement agreement; that its rights are the same as plaintiff Gloria Lohman's rights; and that the only question left was whether plaintiff was entitled to recover against General American. Appellant argues that to allow FDIC to remain a party gave plaintiff and FDIC the advantage of double cross-examination of all defense witnesses, since their interests were the same.

By its cross-bill for interpleader, by its cross-claim against defendant and in its counterclaims against plaintiff, FDIC consistently maintained its independent right to the life insurance proceeds against defendant. The cross-claim is based upon the undisputed fact that part of the funds used to pay the premium for General American's policy of insurance on the life of the deceased, William D. Lohman, were misappropriated monies of the Cedar Vale National Bank, of which FDIC subsequently became receiver. A constructive trust in favor of FDIC resulted, which gave to FDIC as *cestui que trust* the option to enforce the trust against the proceeds of the policy or to claim an equitable lien upon them. The general rule is stated in *Vorlander v. Keyes*, 1 F.2d 67, 69 (8th Cir. 1924):

> * * * not only the property which the trustee acquires with the misappropriated funds, but all its fruits, in every form, its increase, its income, other property acquired by the trustee by the exchange or use of it in any way, *become, at the option of the cestui que trust, his property* * * *. [Emphasis supplied].

See also 38 A.L.R. 930, 24 A.L.R. 2d 672 and Bogert on Trusts, 2nd Ed., Section 925.

The rights of FDIC were not dependent or derivative on or from the rights of plaintiff. Defendant states that it

can find no authority precisely in point, and concedes that "Rule 21 F.R.C.P." gives the trial court a broad discretion in the matter of dropping or adding parties. In denying defendant's motion to dismiss the FDIC or limit its participation, the trial court was clearly within the limits of its broad discretion.

Defendant also assigns as error the denial of its motion for a directed verdict as to FDIC for failure to prove any claim against General American. From our preceding analysis of the evidence and contentions by defendant it is clear that FDIC sustained its own burden of proof, and we need not repeat our conclusions in this regard. The trial court did not err in denying defendant's motion for a directed verdict as to FDIC.

Finally, defendant argues that the cumulative effect of all of the foregoing errors alleged by it, and other errors of the trial court, was prejudicial to General American, under the principle that although individual errors may not establish prejudice, they may in combination equal substantial prejudice, impelling a reversal.

We have examined these other alleged errors, most of which involve narrow and isolated evidentiary rulings by the trial court, whose cumulative effect is claimed to be prejudicial to appellant. We find that these alleged errors, neither individually nor in tandem, resulted in such prejudice. Only one of these claimed errors merits discussion.

Defendant assigns as an instance of cumulative error the admission into evidence of a certified copy of a death certificate as to the death of William D. Lohman which asserts that the death was accidental. We agree that the opinion of accidental death should have been excised from the certificate prior to its admission into evidence, but

under the facts and circumstances of this case, we think the admission did not constitute reversible error.

Rule 43(a), Federal Rules of Civil Procedure, provides that "[a]ll evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

Further, 28 U.S.C. § 1739, provides that: "All non-judicial records of books kept in any public office of any State * * *, or copies thereof, shall be proved or admitted in any court or office in any other State * * * by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept * * * that the said attestation is in due form and by the proper officers." Thus, a certified and authenticated copy of a death certificate (which is what was offered here), if admissible in the State of North Dakota, is admissible in Federal District Court in the State of South Dakota and entitled to full faith and credit just as if it were being admitted in the State of North Dakota.

North Dakota law provides:

Effect of certificate of proof of birth and of certified copy of birth or death certificate. —A registrar's certificate of the record of a birth and a certified copy of

> any birth or death certificate issued by the state registrar of vital statistics shall be prima facie evidence of the facts therein stated and shall be accepted as such proof in any court or before any commission, bureau, board, or agency in this state. 23-02-40 N.D.C.C.

The death certificate is also admissible in Federal court in South Dakota if it is admissible under the rules and statutes of the State of South Dakota. Rule 43(a), F.R.C.P.; 28 U.S.C. § 1739.

South Dakota has a statute very similar to North Dakota's 28-02-40, N.D.C.C. It is S.D.C. 27.0220, providing that a certified copy of a death certificate " * * * shall be prima facie evidence in all the Courts of this State of the facts therein stated * * *."

This section has been construed in *DeGooyer v. Harkness*, 13 N.W.2d 815 (S.D. 1944), holding that a certified copy of the death certificate is admissible. This case does, however, say that an opposing party would be entitled to move that part of the certificate be excluded if necessary.

It bears repeating that " * * * the law is generally speaking, in great confusion * * *," *Marker v. Prudential Ins. Co. of America*, 273 F.2d 258, 262 (5th Cir. 1959), upon the question of admissibility of a death certificate containing an opinion on the ultimate fact to be proved, namely, accident or suicide. We have not found any North Dakota case construing 23-02-40 N.D.C.C. with respect to the precise question here involved. The case of *Brinkman v. Mutual of Omaha Ins. Co.*, 187 N.W. 2d 657 (1971), does not assist us. In that case the court admitted under authority of 23-02-40 N.D.C.C. a death

certificate containing a statement by the coroner, who was a physician, that the cause of death was "coronary thrombosis." This was a medical conclusion based upon observable medical facts quite unlike the bald assertion of accidental death contained in Lohman's death certificate.

Similarly, we have found no South Dakota cases construing S.D.C. 27.0220 as to the precise question before us.

We believe the more salutary rule, expressed by the majority of cases construing statutes such as 23-02-40 N.D.C.C., making the death certificate prima facie evidence, is that the certificate is only prima facie evidence of the facts stated in the certificate and not of any opinion. See 28 A.L.R. 2d 352, 362-64; 21 A.L.R. 3d 418, 449-456. See also *Lockwood v. Travelers Ins. Co.*, 498 P.2d 947, 952 (1972) and cases cited therein.

The conclusion of the coroner that the death in this case was accidental is a mere opinion, the same as it would be if he had concluded the death was suicidal. Even more convincingly, we do not think that the imprimatur of "prima facie evidence" should be given to such an assertion of an essentially nonmedical opinion as to the ultimate fact and pivotal issue in this case.[4]

Although the coroner's opinion should have been excised from the death certificate prior to its admission into evidence, the admission of the certificate did not constitute reversible error given the facts and circumstances of this case. The assertion of opinion in the certificate was not affirmatively exploited by plaintiff

[4] The opinion expressed in the death certificate was that Lohman " • • • was coincidentally shot in the head getting in or out of the pickup" and " • • • that death was met by accident." Trial Transcript, p. 207.

throughout the trial, and its importance was in fact minimized. The *only* reference to the certificate in oral argument to the jury was by plaintiff's attorney who merely stated: "We have in evidence the death certificate for whatever its worth, it's not signed — it's not a doctor, it's a layman, he says it was accidental death due to getting in or out of a pickup." The effect of such a statement by plaintiff's counsel was to minimize the importance of the death certificate, at least as to the cause of death.

In short, plaintiff did not rely upon the conclusions in the certificate in her argument and only referred to it as being admissible for whatever weight the jury might want to give it. There was certainly other evidence both ways on the suicide issue, and the jury would be the trier of that ultimate fact. Defendant was not prejudiced to a reversible extent, although a close question is admittedly presented.

The judgment of the District Court is hereby affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1123. September Term, 1972

Gloria M. Lohman,

Appellee,

v.

General American Life Insurance Company,

Appellant,

and

Federal Deposit Insurance Corporation, et al,

Appellees.

Appeal from the United States District Court for the District of South Dakota.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

May 17, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-111

GLORIA M. LOHMAN,
Respondent,

vs.

GENERAL AMERICAN LIFE INSURANCE COMPANY,
Petitioner,

and

FEDERAL DEPOSIT INSURANCE CORPORATION and FEDERAL DEPOSIT INSURANCE COMPANY as STATUTORY RECEIVER OF CEDAR VALE NATIONAL BANK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

Not published as yet, they are Appendices A & B to Petition for Certiorari.

JURISDICTION AND QUESTIONS FOR REVIEW

Respondent agrees with the statement in the Petition.

STATEMENT

This action was once dismissed in the District Court for procedural reasons, because of the dereliction of duty by former attorneys for the plaintiff, the firm of F. Lee Bailey of Boston. The Trial Court entered its order "that plaintiff's cause of action and complaint against the defendant General American Life Insurance Company be, and the same is, hereby dismissed in all respects pursuant to Rules 37 and 41(b), Federal Rules of Civil Procedure." (Appendix 96-8). No judgment of dismissal was entered.

Subsequently, the same former attorneys for the plaintiff attempted to appeal from the Order of the Trial Court (even though no judgment was ever entered on that Order) and similarly botched the appeal. The consequence was that the Court of Appeals "ordered that this appeal be, and it is hereby, dismissed pursuant to Rule 30(b), Federal Rules of Appellate Procedure, and our local rules 8 and 13." (A. 103). (These rules, of course, are procedural rules and a dismissal based on them does not purport to reach the merits.) The appeal to the Court of Appeals was based entirely on technical grounds (supplementary appendix pages 1-2), alleging that the plaintiff had not

> "served on the appellee a designation of the parts of the record which he intends to include in the appendix and a statement of issues which he intends to present for review."

The Plaintiff had no knowledge of the misconduct of her attorneys until some time after the dismissal of the action in the District Court and the dismissal of the appeal.

The Trial Court's instructions as to the law of South Dakota included much more than the portion quoted in the Petition for a Writ of Certiorari herein. The pertinent portions of the instructions, including the brief portion referred to in the Petition for a Writ of Certiorari are as follows:

> "(3) That scene, explained as it has been in the evidence and as used in the arguments, is with the rules and observations in these instructions, your only guidelines, as you proceed towards and for a verdict of death by accident as it is covered in the policy, or a verdict by means other than accidental which would include the asserted defense of suicide.
>
> (4) As you give effect to all guidelines, you are instructed that the burden of proof is on Gloria, by a preponderance of the evidence, to show the death to have been caused by accident.
>
> (10) . . . 'burden of proof', as used in these instructions, is meant the obligation resting upon a party to prove the truth of an allegation made by him which is denied by the opposing party; (2) 'preponderance of the evidence' is meant the greater weight of the evidence or the value thereof. This is determined not alone by the greater number of witnesses testifying to or for a disputed fact, but is that evidence which in your judgment is the more credible and has to your minds a greater and more convincing force, . . .
>
> (13) Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as

stated in these instructions of the Court, and to apply the law so given to the facts as you find them from the evidence before you.

—You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

(16) Other rules to be applied may be summarized: . . . (2) Your verdict should be for the plaintiff, Gloria M. Lohman, and the additional defendants, Federal Deposit Insurance Corporation and Federal Deposit Insurance Corporation, as statutory receiver of Cedar Vale National Bank, if under this record you find William D. Lohman's death to have been caused by an accident, and otherwise for the defendant insurance company if you find his death not to have been caused by accident or under this record, a suicide; . . ."

ARGUMENT

1. A dismissal of an action on procedural grounds under Rules 37 and 41, Fed. R. Civ. P. and a dismissal of an attempted appeal under Rule 30(b), Fed. R. App. P., do not preclude a reopening of the judgment under Rule 60, Fed. R. App. P.

Obviously, neither the dismissal of the action nor the dismissal of the appeal was on the merits. Thus, there was no mandate from the Court of Appeals, and the District Court retained its discretion to act under Rule 60 (b). *7 Moore's Federal Practice 60.30(2)* at pages 424, 425. If the motion for relief under Rule 60(b) raises matters that are not within the compass of the mandate, the District Court clearly has the power to proceed with the 60(b) motion without leave of the Appellate Court. *Moore's Federal Practice 60.27(2)*.

Judgments disposing of a case without consideration of the merits, such as dismissals for failure to observe the rules and orders of the court, are considered against a background of general preference for disposition of cases on their substantive merits. *Moore's Federal Practice 60.27(2)*, page 362.

In addition to the foregoing, there are further reasons for the action taken by the District Court, which was affirmed by the Court of Appeals on appeal in the present action. The Court, in holding that its prior order was "void", obviously considered that, under the circumstances, including the fact that the attorneys had failed to properly represent her and the fault was not hers, the dismissal was tantamount to a denial of due process of law. As the Court of Appeals said,

"It is not our task in this case to consider anew whether or not the former order of dismissal was tantamount to a violation of due process but rather to ascertain whether or not the District Court abused its discretion in judging its former order void. The District Court clearly had the power to grant relief under Rule 60(b). The grant of relief involved an appraisal of the facts. Such an appraisal and grant of relief are largely within the discretion of the Trial Court. See Assman v. Fleming, 159 F.2d 332 (8th Cir. 1947); Conerly v. Flower, 410 F.2d 941 (8th Cir. 1969). There has been no clear showing of abuse of discretion. Farmers Co-op. Elevator Ass'n Non-Stock v. Strand, 382 F.2d 224 (8th Cir. 1967), cert. denied, 389 U.S. 1014 (1967). We therefore have no reason to find the District Court in error in vacating its former order of dismissal of the complaint."

In addition, the order of dismissal of the Trial Court was not a decision on the merits, because it stated other grounds for the order. The Court of Appeals so recognized. Citing *Madden* v. *Perry*, 264 F.2d 169, 175 (7th Cir. 1959), the Court of Appeals held that the District Court's Order for Dismissal for failure to answer interrogatories effectively "otherwise specified", and thereby precluded the operation of the provision of Rule 41(b), providing that an order is an adjudication upon the merits "unless the Court in its Order for Dismissal otherwise specifies, . . ."

The Court of Appeals held authoritatively that its dismissal of the first appeal was "on the technical ground urged in motion by General American", that such a dismissal "can hardly be considered a 'final judgment on the merits', and the mandate of the Court of Appeals dismissing plaintiff's appeal neither 'encompassed' nor 'disposed

of any of the issues subsequently considered by the District Court."

Further, as we urged in the Court of Appeals, the petitioner was not even prejudiced by the dismissal in the District Court since it dismissed only one party claiming relief in full against it (Gloria Lohman), and left intact the claim of the Federal Deposit Insurance Corporation for the same double indemnity funds.

Finally, the procedure of making application under Rule 60(b) was proper, *Stebbins* v. *State Farm Mutual Automobile Insurance Company,* 413 F.2d 1100, and *Mooney* v. *Central Motor Lines,* 222 F.2d 569. The Court of Appeals so held.

2. The instructions of the Trial Court as to burden of proof were eminently proper and correct.

Petitioner's grievance seems to be that the trial court refused to instruct in the exact language of its requested instruction or the exact language of *Headlee* v. *New York Life Insurance Company,* 12 NW2d 313. Of course, the Court is not obligated to use the exact language of a prior decision. *Roth* v. *Jelden,* South Dakota, 118 NW2d 20.

In *Headlee* there was a reversal because the Court instructed the jury that the burden of proof was upon the defendant to prove that the death was by self destruction. There is no hint of such an instruction here. On the contrary, Judge Beck's instructions numbers 4, 10, and 16, squarely place the burden of proof on the plaintiff.

Petitioner seems to have a claim that the jury should have had the opportunity to consider three verdicts, instead of two. Apparently petitioner believes that the jury should have been instructed to find either for the plaintiff, or for the defendant if its proof preponderated on the

factual issues, or for the defendant if the plaintiff failed to sustain her burden of proof. Such a position is novel, to say the least. It is also quite ridiculous, where the jury was clearly instructed that they must find for the defendant if *either* the evidence of the defendant preponderated *or* the plaintiff failed in her burden of proof.

There was no question of the death of William D. Lohman. There was likewise no question that the death was either by accident or suicide (in spite of some rather clumsy efforts to assert that the defendant did not claim death by suicide). The jury was clearly instructed that the burden of proof was on the plaintiff, that the verdict should be in her favor if the jury found that William D. Lohman's death was caused by an accident, and otherwise it was to be for the defendant. As the Court of Appeals said, "although defendant in theory did not expressly plead suicide as a defense, it clearly raised the issue of suicide by the presentation of its evidence and cross-examination throughout the trial. If the Court had found the evidence equally balanced between the accidental death and suicide, it would have been governed by the Court's repeated instruction that 'the burden is on Gloria (plaintiff) by a preponderance of the evidence, to show the death to have been caused by accident'."

The instructions, given by a District Judge who was a long time practitioner and Federal Judge in South Dakota, and approved by the Court of Appeals, were eminently correct under South Dakota law.

3. There is no due process question in this case.

The cases cited under paragraph 1 clearly show that the procedure in this case, particularly the reopening of the case under Rule 60(b), were proper, and the discussion under 2 above shows that the instructions were emi-

nently proper under South Dakota law as well as the Federal case law. This being so, citation to *Erie* v. *Tompkins*, 304 U.S. 64, is both inappropriate and puzzling, and it is apparent that there is no due process question in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
SEP 18 1973
JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-111

GLORIA M. LOHMAN,

Respondent,

v.

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Petitioner,

and

FEDERAL DEPOSIT INSURANCE CORPORATION and FEDERAL DEPOSIT INSURANCE COMPANY AS STATUTORY RECEIVER OF CEDAR VALE NATIONAL BANK,

Respondents.

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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9-14-73-59

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Respondents.

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ARGUMENT

I.

1. Did the Court below err in holding that the District Court (1) had jurisdiction to set aside its former order of

dismissal and (2) did not abuse its discretion in setting aside the order of dismissal as "void", after the appeal from the dismissal had been dismissed, and acting on its own motion, and without any finding as to why the former order of dismissal was "void"?

Respondent talks on Page 5 of her Opposition Brief of "the motion for relief under Rule 60(b), " which is misleading. The fact is respondent never made any motion for relief under Rule 60(b). Her motion was a simple "Motion to Amend" which asked the District Court "to provide that it [the dismissal order of April 19, 1971, under Rules 37 and 41(d) F.R.C.P.] is not a judgment on the merits ...."

The Court did not respond to a Rule 60(b) motion. It simply held, on the basis of the plaintiff's Motion to Amend, that under Rule 60(b) its order April 19, 1971, was void, without ever stating the basis for its jurisdiction to amend the order, or the reasons upon which it held the April order was void.

We thus urge that plaintiff's Motion to Amend, and the Court's order which purported to act under Rule 60(b), were not effective. The Court stated an unfounded conclusion that its prior order of dismissal was void, but with no basis for the finding—either stated or unstated.

The opinion of the Eighth Circuit finds that the District Court specified in its dismissal order, in accordance with the provisions of Rule 41(b), that the dismissal was not on the merits "by finding that plaintiff had failed to comply with the Court's order to compel plaintiff to answer interrogatories, as ordered pursuant to Rules 37 and 41(b) of the Federal Rules of Civil Procedure."

This is also a non sequitur which hangs suspended in space with nothing to support it from either above or be-

low. Although the April 19, 1971, order did state that the dismissal was on account of plaintiff's failure to comply with the discovery orders, it clearly provided that the dismissal was "in all respects pursuant to Rules 37 and 41(b), Federal Rules of Civil Procedure."

What other effect than dismissal on the merits could the order of dismissal have had under its verbiage? Plaintiff's counsel apparently understood the effect of the order was a dismissal on the merits, else the "Motion to Amend" would not have been filed.

II.

2. Did the Court below err in refusing to reverse the case because the Trial Court failed to charge the law as enunciated by the Supreme Court of South Dakota, despite the fact that this omission was repeatedly called to the Trial Court's attention?

3. Was the petitioner denied due process of law when (1) a judgment in its favor was set aside as "void" when neither party contended it was void and the Court itself did not state in what respect it was void; and (2) in a diversity case, the applicable state law was not charged, as required by *Erie v. Tompkins*, 304 U.S. 64?

Under *Erie*, the District Court is bound to follow the substantive law of South Dakota.

What we have not been able to get across is that the Court's instruction was not simply inadequate; it *failed to follow* the clear mandate of the South Dakota law.

In *Headlee v. New York Life Ins. Co.*, 12 N.W. 2d 313 (S.D. 1943), the leading South Dakota case on the question of jury instruction in an accidental death case, the Court said at 315:

> The burden is upon the plaintiff "to show that the specific condition precedent on which the liability is contingent has taken place", i.e. accidental death.
>
> . . .
>
> Since death by self-destruction is not an accidental but an intentional means, the evidence must by its purport negative such means.
>
> . . .
>
> ... death by self-destruction or suicide is not an exception to the contractual liability but simply fails to come within the liability created by the contract.

The Court said further in 12 N.W. 2d at 317:

> Likewise as to the opposing evidence, the jury should be instructed to weigh its credibility and effect in the usual way, and finally, upon the whole evidence, to determine whether death by accident has occurred, ***bearing in mind that if the evidence leaves their minds in such doubt that they are unable to decide the point, the verdict should be against the party upon whom the burden of persuasion rests***. Such a charge can be easily understood and enables the jury to do justice to both sides. [Emphasis ours]

A review of the entire charge by the Court set out in the Appendix hereto (Page A. 1) clearly illustrates that the requirements of ***Headlee*** were not followed.

Furthermore, with the injection by the Court of the presumption against suicide into its charge, and the reference in the charge to the "asserted defense of suicide" we believe that the Court's instructions do not only not meet the mandate of ***Headlee***, but drive the jury toward a plaintiff's verdict.

CONCLUSION

If *Erie* means anything, the Court, while not required to extract the language for its jury instruction verbatim, is nevertheless required to include in its instructions, in a clear, cogent manner so as to be readily perceived by the lay jury, the ideas or principles expressed by the case law of the state upon the particular subject. If the *Erie* doctrine and the directions set out in *Headlee* are authoritative, in this litigation over the plaintiff's claim to be paid accidental death benefits, both the plaintiff and defendants had a *right* to have the court charge the jury on the principles enunciated in *Headlee*.

The whole process of a jury trial is normally aimed toward the court's charge to the jury which is a capstone — giving significance to the turbulence and conflict of the proof which the jury has heard. Unless that charge is accurate, complete and impartial, the work of the advocates for each side is frustrated.

The charge by the Court in this case was neither accurate nor complete. It did not follow the mandate of the South Dakota authority on instructing a jury in a suit for accidental death benefits.

We respectfully urge that the Petition for Certiorari be granted.

Respectfully submitted,

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THE COURT'S CHARGE

[1231] THE COURT: Members of the jury:

(1) Gloria M. Lohman, the plaintiff, is in this case against the General American Life Insurance Company demanding $100,000 under the double indemnity terms of the insurance policy carried with her husband, William D. Lohman, it being in full force and effect at the time of his death on July 10, 1967. She is also in conjunction therewith claiming interest at the legal rate of six per cent.

Her theory and that of the additional defendants, Federal Deposit Insurance Corporation and Federal Deposit Insurance Corporation, as statutory receiver of Cedar Vale National Bank, is that the gun shot wound causing his death, was the result of an accident and that the double indemnity provisions for that reason can and should be enforced.

The General American Life Insurance Company, on the other hand, for its defense, aside from a general denial, advances suicide as the cause and Gloria's claim, therefore, not to be allowed.

(2) Gloria's proof, during the course of the trial, that William died instantly as the result of a bullet from his gun entering the head is not in dispute. Also not controverted is the scene depicted in the photographs and explained in the testimony showing parts of his brain, fragments of his skull and skin inside and outside of the cab of the pickup truck and the locations of the body
[1232] and the rifle after death.

(3) That scene, explained as it has been in the evidence and as used in the arguments, is with the rules and

observations in these instructions, your only guidelines, as you proceed towards and for a verdict of death by accident as it is covered in the policy, or a verdict by means other than accidental which would include the asserted defense of suicide.

(4) As you give effect to those guidelines, you are instructed that the burden of proof is on Gloria, by a preponderance of the evidence, to show the death to have been caused by accident. However, this rule does not require proof to an absolute certainty, since proof to that extent is seldom possible in any case, and she is not required to prove the exact means by which the rifle could have been discharged, which in different language can be expressed as a rule that accidental death can be established by evidence, either direct or circumstantial.

(5) Suicide having been injected against the claim of accidental death, you are instructed that it under the law of this state is an improbable event and generally so recognized in the light of common experiences of mankind, thus leaving it for you, the jury, under this record to have it enter into your deliberations, but to give it such weight only as it may deserve, with proof thereof, as you find it, in the evidence, either direct or circumstantial.

[1233]

(6) As you apply those guidelines to the asserted defense of suicide and any motive for it, you are to consider not only all of the evidence showing the cause or causes for the closing of the Cedar Vale bank on July 8, 1967, Lohman's reactions to that event, to his partner Oltjen's bogus bank operations, to the concern on his part as to civil liability and possibility of criminal prosecution, and on the basis of it all, did it, as asserted by the General

American Life Insurance Company, two days after closing, lead to suicide.

As against that claim also within those guidelines is Gloria's, that her husband's death on July 10, 1967, under the terms of the policy was the result of an accident and that it could not have been otherwise in view of his personality as it has been described, the extent of his assets, real and personal here and elsewhere, the extent also of his cattle feeding operations, his credit standing and the confidence in him by others, all permitting a conclusion against self-destruction.

(7) Evidence has been received as to state-
[1234] ments made by William D. Lohman and of transactions had with him during his lifetime. You are instructed that evidence as to such statements and transactions purportedly had or made with a deceased person should be received with great caution and careful scrutiny as no class of evidence is more subject to error or abuse. This is because witnesses, even those with the best of intentions and motives, generally are unable to recall the exact language of an admission or statement and are, therefore, liable by change of a word to give a false impression of the language which had been used. Such evidence, accordingly, under this rule is only to have the weight it deserves.

(8) You are further instructed that the credibility of Ray D. Oltjen, whose deposition has been read into evidence, may be considered as you decide on the weight or credit that evidence should have, since he prior to the time of his deposition had been convicted of a felony involving moral turpitude.

(9) Again, you are instructed that every person under the laws of this state and Kansas, who shall obtain or attempt to obtain, from another any money or property by means or by use of any false or bogus check, draft, or by any other means, instrument, or device, shall be guilty of a felony and upon conviction to be punished as provided by law.

(10) Certain legal terms, the import of which may not be familiar to you, are hereby defined: (1) "burden of proof", as used in these instructions, is
[1235] meant the obligation resting upon a party to prove the truth of an allegation made by him which is denied by the opposing party; (2) "Preponderance of the evidence" is meant the greater weight of the evidence or the value thereof. This is determined not alone by the greater number of witnesses testifying to or for a disputed fact, but is that evidence which in your judgment is the more credible and has to your minds a greater and more convincing force, and (3) "evidence" is whatever is admitted in the trial of the case as a part of the record, whether it be an article or document, or other instrument marked as an exhibit, or other matter formally introduced and received, a stipulation, or the testimony of the witnesses who have appeared as such during the course of this trial, to which I will add that there are two types of evidence from which the jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness; the other is indirect or circumstantial evidence—proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

[1236] As a general rule, the law makes no distinction between direct and circumstantial evidence.

but simply requires that the jury find the facts in accordance with the preponderance of all of the evidence in the case, both direct and circumstantial.

(11) A presumption is a rule of law which permits the jury to find the existence of one fact from proof of another fact. It continues in effect until overcome or outweighed by evidence to the contrary; but if it isn't, the jury should find in accordance with the presumption, but if you do, you must keep in mind that the facts giving rise to such a presumption must have been established by a preponderance of the evidence.

(12) The rules of evidence ordinarily do not permit a witness to testify as to opinions or conclusions. A so-called expert witness is an exception to this rule. A witness, who by education and experience has become expert in any art, science, profession or calling, may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion.

You should consider the expert opinions received in evidence in this case and give them such weight
[1237] you think they deserve; and you may reject all or any of them entirely if you conclude the reasons assigned in support are unsound, or if you feel them, or either of them, to have been outweighed by other evidence.

(13) Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in these instructions of the court, and to apply the law so given to the facts as you find them from the evidence before you.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

No language used by the court in these instructions, and no statements, remarks, or rulings made during the progress of this trial shall be considered by you to mean that the court entertains any opinion in relation to any of the facts in the case or what your verdict should be.

[1238] You will disregard all evidence excluded or stricken from the record during the progress of the case, and you are not to give the same any consideration whatsoever in arriving at your verdict.

(14) Statements and arguments of counsel, whether made in the opening statements, elsewhere during the progress of the trial, or in the final arguments do not constitute evidence and must not be regarded as such. It is otherwise if such statements are in the form of admissions or stipulations of fact in which event the matters covered by the language stand as a fact or facts conclusively proved.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify, but you are permitted to draw from facts which you find have been proved such reasonable inferences as seem justified in the light of your experience.

[1239] (15) You are the sole judges of the weight of the evidence, the credibility of the witnesses, and the conclusions to be drawn from the facts and circumstances proved. In passing on the credibility of the witnesses and in weighing their testimony, you may and should consider their appearance and conduct on the witness stand; their interest or lack of interest in the results of the trial; their motives, if any, actuating them as witnesses, their candor, fairness, bias or prejudice, their knowledge, recollection and means of knowledge of the matters whereof they speak; the reasonableness or probability of their statements or want thereof and each fact and circumstance proved, thus giving to the testimony of each witness and to each fact and circumstance such weight and such only as ought reasonably and justly be given in view of all of the evidence.

You should consider and compare the proof which tends to support the claims of the respective parties and reason upon the same as jurors of intelligence and common sense, and return true verdict according to the evidence and the instructions now given you by the court.

(16) Other rules to be applied may be summarized: (1) your verdict is not to be based on sympathy or prejudice for or against either party; (2) your verdict should be for the plaintiff, Gloria M. Lohman, and the additional defendants, Federal Deposit Insurance Corpora-
[1240] tion and Federal Deposit Insurance Corporation, as statutory receiver of Cedar Vale National Bank, if under this record you find William D. Lohman's death to have been caused by an accident, and otherwise for the defendant insurance company if you find his death not to have been caused by accident, or under this record, a suicide; (3) the verdict rendered must represent the con-

sidered judgment of each juror, in other words, each one of you must agree on the one you render; and (4) the verdict must be unanimous.

(17) Upon retiring to the jury room, you will select a foreman who will preside over your deliberations and be your spokesman in court; he or she will see to it that discussion is carried on in an orderly and proper manner; that all issues are fully and freely discussed; that every juror is given an opportunity to express his or her views and that balloting is properly performed.

The form of verdict to which I have referred is to be dated and signed by your foreman after you shall have reached a unanimous decision.

If, during your deliberations, it becomes necessary to communicate with the court, you should make your request in writing, deliver it to the deputy marshal, and he in turn will deliver it to the court. Do not at-
[1241] tempt to make communication in any other manner, and bear in mind also that you are not to reveal to the court or to any person how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.